MALAYSIAN REPORTS

Mejar Ali Zaman bin Ali Hassan v Captain Abdul Kadir & Anor

HIGH COURT (PENANG) – ORIGINATING MOTION NO 32-51-86
EDGAR JOSEPH JR J
15 MAY 1989

Armed Forces – Criminal procedure – Court martial – Certiorari – Applicant formally charged with fraud/dishonesty but subsequently convicted of negligence – Whether judicial, wrong in law and in breach of rules of natural justice – Circumstances in which civil court can interfere with military courts decision – Whether applicant was prejudiced by conviction – Armed Forces Act 1972, ss 61, 77, 87 & 122 – Armed Forces (Court Martial) Rules of Procedure 1976, rr 40(1), 42(2), 47(2), 101(1) & (2) – Criminal Procedure Code, ss 163 & 167

Administrative Law – Certiorari – Applicant convicted before court martial – Whether certiorari lies against decision of court martial – Procedural fairness – Requirements – Right to be heard – Whether court martial had acted without jurisdiction

The applicant was prosecuted before a general court martial upon the charge of failing to make an entry in a service document with intent to cheat and, with intent to misappropriate a sum of $6,262.70 omitting to record particulars thereof in the ledger although he was required to do so. Members of the court martial found the applicant not guilty as charged but guilty of negligence in accordance with r 47(2) of the Armed Forces (Court Martial) Rules of Procedure 1976 which provides:

> When an accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.

The applicant was then sentenced to 12 months' imprisonment and dismissed from his Majesty's service with disgrace. The finding and sentence were later confirmed by the confirming office. The applicant then applied to court for certiorari to remove into court for the purpose of it being quashed the aforesaid finding and sentence, alleging that 'the manner in which the court convicted and sentenced the applicant was not judicial, wrong in law and in breach of the rules of natural justice'.

Held, allowing the application:

(1) A conviction upon a charge which was not expressly formulated is not illegal where the acts which were necessary to prove on a charge as framed and in respect of which evidence was led by the prosecution are the same as the facts upon which the accused could be convicted of the charge which was not expressly formulated, provided that the accused is put to no disadvantage and would have had to adduce no further evidence. Here, the judge-advocate made only a general and very brief reference to the powers of the court martial to convict of an offence other than that charged under r 47(2), without affording any guidance as to the conditions necessary for the exercise of such powers or even mentioning what other offence the applicant could have been convicted of. This was clearly a misdirection by way of non-direction.

(2) The High Court is not a court of appeal in relation to the court martial whose decision is under review.

(3) If there is an established appeal procedure from the decision of the body under review the court usually prefers this course to be followed. There are exceptions; if the matter under consideration is primarily one of law, or if a speedy decision is needed, judicial review may be more appropriate. Therefore, the existence of alternative remedies is not, by itself, a ground for refusing relief by way of prerogative orders.

(4) Courts can only interfere with military courts and matters of military law in so far as the civil rights of a soldier may be affected. Hence, for example, the dismissal of an officer from the service, the deprivation of rank or the deprivation of military pay will not be remedied by a court of law but the court ought to interfere to protect rights of life, liberty or property.

(5) The basic principle is that for every distinct offence of which any person is accused there shall be a separate charge. The object of this provision is based on ideas of natural justice. Here, the ingredients of the offence with which the applicant had been formally charged were materially different from those of the offence of which he was ultimately convicted. The issues which arose for decision being different, the evidence led by the prosecution which would have to be directed in relation to those issues would most probably have been different and, almost certainly, the cross-examination of the prosecution witnesses would be along different lines being aimed at showing that in acting in the manner he did at the material time the applicant was not guilty of any act, conduct or neglect to the prejudice of good order and service discipline. Had the offence of which the applicant was ultimately convicted been an offence with which he was formally charged, then the evidence called by the defence and the submissions by his counsel would have been along very different lines compared to what had transpired during the trial. In the circumstances, the applicant had been gravely prejudiced when he was convicted.

(6) At the heart of procedural fairness, excluding bias, lies the following: (i) the right to acknowledge of the opposing case; and (ii) a fair opportunity to answer the charges. Upon the face of the record the court martial in convicting the applicant of an offence in contravention of s 87 of the Act in purported exercise of their powers under r 47(2) had violated the rules of natural justice and had acted beyond the scope of their powers and so acted without jurisdiction. Thus, the verdict was vitiated by illegality. In the result, certiorari must go to quash the verdict and sentence of the court martial.

Cases referred to

1 *Lew Cheok Hin* v *R* [1956] MLJ 131 (folld)
2 *Associated Provincial Picture Houses* v *Wednesbury Corporation* [1948] 1 KB 233 (folld)
3 *Square Meals Frozen Foods Limited* v *Dunstable Corporation* [1974] 1 WLR 59 (folld)
4 *R* v *Crown Court at Ipswich, ex p Baldwin* [1981] 1 All ER 596 (folld)
5 *R* v *Hackney Borough Council, ex p Teepee Estates (1956) Ltd* (1967) 19 P & CR 87 (folld)
6 *R* v *Camden London BC, ex p Comyn Ching & Co (London) Ltd* (1984) 47 P & CR 1417 (folld)
7 *R* v *Hillingdon London BC, ex p Royco Homes Ltd* [1974] QB 720 (folld)
8 *R* v *Board of Visitors of Hull Prison, ex p St Germain* [1979] 1 All ER 701 (folld)
9 *R* v *Huntingdon DC, ex p Cowan* [1984] 1 WLR 504 (folld)
10 *R* v *Paddington Valuation Officer, ex p Peachey Property Corp* [1966] 1 QB 380 (folld)

11 *Peter Chong Ngen Onn & Ors* v *Col Adam bin Abdul Bakar & Ors* [1977] 2 MLJ 142 (folld)
12 *R* v *Secretary of State for War, ex p Martyn* [1949] 1 All ER 242 (folld)
13 *Ex parte John Fogan* (1949) 48 DLR 194 (folld)
14 *Humayoon Shah* v *R* (21) WR 72 (folld)
15 *Ridge* v *Baldwin* [1964] AC 40 (folld)
16 *Bugdaycay* v *Secretary of State for the Home Department* [1987] 1 All ER 940 (HL) (folld)
17 *B Surinder Singh Kanda* v *The Government of Malaya* [1962] MLJ 169 (folld)
18 *Council of Civil Services Unions* v *Minister for the Civil Service* [1984] 1 WLR 1174 (folld)

Legislation referred to
Armed Forces Act 1972 ss 61, 77, 87, 122
Armed Forces (Court Martial) Rules of Procedure 1976 rr 40(1), 42(2), 47(2), 101(1), (2)
Criminal Procedure Code ss 163, 167

Karpal Singh for the applicant.
Azlan bin Abdul Halim for the respondent.

Cur Adv Vult

Edgar Joseph Jr J: The applicant, Mejar Ali Zaman, the Camp Commandant attached to the HQ 2 Division Batu Ferringhi, Penang, was prosecuted before a general court martial held in Penang, upon the following charges:

1st Charge
Failing to make an entry in a service document with intent to cheat in contravention of s 77(d) Armed Forces Act 1972, in that at Kem Batu Ferringhi, Pulau Pinang between 22 April 1983 and 31 December 1983 (or thereabouts) he did, with intent to misappropriate a sum of money amounting to $6,242.70 (ringgit six thousand two hundred and forty two and cents seventy only), omit to record particulars thereof in the ledger of the Regiment Kem II Division welfare fund, although he was required to do so. The ledger concerned being a service document reflecting the flow of cash at the material time.

2nd Charge
Making a false entry in a service document in contravention of s 77(a) Armed Forces Act 1972, in that he did, at Kem Batu Ferringhi, Pulau Pinang, on or about 25 July 1983, make an entry in the ledger of the Regimen Kem II Division welfare fund being a service document to give the appearance that on 25 July 1983 he had paid out the sum of $790 (ringgit seven hundred and ninety only) when he knew to be false.

3rd Charge
Falsifying a service document in contravention of s 77(a) Armed Forces Act 1972, in that he did, at Kem Batu Ferringhi, Pulau Pinang, on or about 10 September 1983, falsify the signature of one Lt Kol Nordin bin Haji Mohd Ali (12451) in a payment voucher bearing Serial No 88 for the sum of $1,130.70 (ringgit one thousand one hundred and thirty and cents seventy only) as recipient of the said sum which he knew to be false.

4th Charge
Falsifying a service document in contravention of s 77(a) Armed Forces Act 1972, in that he did, at Kem Batu Ferringhi, Pulau Pinang, on or about 23 July 1983, falsify the signature of one Datin Majmin binti Dato Haji Yahya in a payment voucher bearing Serial No 59 for the sum of $500 (ringgit five hundred only) as recipient of the money which he knew to be false.

5th Charge
Falsifying a service document in contravention of s 77(a) Armed Forces Act 1972, in that he did, at Kem Batu Ferringhi, Pulau Pinang, on or about 3 May 1983, falsify the signature of one Mej George Yong (200834) in a payment voucher bearing Service No 9 for the sum of $70 (ringgit seventy only) as the recipient of the said sum which he knew to be false.

6th Charge
Falsifying a service document in contravention of s 77(a) Armed Forces Act 1972, in that he did, at Kem Batu Ferringhi, Pulau Pinang, on or about 3 April 1983, falsify the signature of one Kapt (KM) Shamsuddin bin Mat (3002337) in a payment voucher for the sum of $1,771 (ringgit one thousand seven hundred and seventy-one only), as recipient of the said sum which he knew to be false.

7th Charge
Misappropriating by deceitful means property of the service in contravention of s 61(a) Armed Forces Act 1972, in that he did, at Kem Batu Ferringhi, Pulau Pinang, on or about 19 November 1983, as account holder of Regimen Kem II Division welfare fund, misappropriate by deceitful means, the sum of $1,650 (ringgit one thousand six hundred and fifty only) or part thereof, being property of the service.

At the commencement of the trial, the prosecution withdrew the second and the seventh charges and the trial proceeded on the remaining charges.

At the close of the case for the prosecution, following a submission of no case to answer, the applicant was acquitted of the third, fourth, fifth and sixth charges but was called upon to make his defence in respect of the only remaining charge, to wit, the first charge. The applicant gave evidence on oath but called no witnesses on his behalf. After final addresses by the defence and the prosecution, the judge-advocate summed up the case outlining the evidence called by the prosecution and the defence and making such comments thereon as he thought fit. But then, towards the end of his summing up, he added this:

> Finally I would like to tell you that as a point of law, that the court has inherent power as to convict or acquit the accused as charged or on any other charges you may deem fit and proper based on evidence adduced.

The members of the court martial then retired to deliberate and reconvened to deliver their verdict, the material portion of which reads as follows:

> The court finds you not guilty as charged but guilty of negligence contrary to s 87 of the Armed Forces Act 1972 in accordance to Armed Forces (Court Martial) Rules of Procedure 1976 r 47(2) which empowers the court martial to convict for offence other than that charged. In that, you did allow others to interfere with the maintaining of the PRI 2

DIV account in which you were the account holder resulting in the loss of $6,242.70 (ringgit six thousand two hundred and forty two and cents seventy only).

Section 87 of the Armed Forces Act 1972, ('the Act'), reads as follows:

Every person subject to service under this Act who is guilty of any act, conduct or neglect to the prejudice of good order and service discipline, shall on conviction by court martial be liable to imprisonment for a term not exceeding two years or any less punishment provided by this Act.

Rule 47(2) of the Armed Forces (Court-Martial) Rules of Procedure 1976 (PU (A) 163/1976) ('the Rules') reads as follows:

When an accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.

In the event, the applicant was sentenced as follows:

12 months imprisonment and to be dismissed from his Majesty's service with disgrace.

Although the applicant could thereafter have availed himself of a two-tiered remedy under the Rules; first, to petition the confirming officer (r 101(1)) and then the reviewing authority (r 101(2)) against the finding and/or sentence aforesaid, he refrained from doing so because, to quote him:

It is my respectful submission that the order of hierarchy in the Armed Forces being as it is, justice would not be done nor seem to be done by any petition to the confirming officer.

However, pursuant to s 122(1) of the Act which provides that where a court martial finds an accused guilty on any charge the record of proceedings of the court martial shall be transmitted to a confirming officer for the confirmation of the finding and sentence of the court martial on that charge, the convening authority of the court martial did transmit the record of proceedings to the confirming officer who being satisfied that there was no miscarriage of justice confirmed the finding and sentence aforesaid. The applicant then applied to this court pursuant to leave having been granted for certiorari to remove into this court for the purpose of it being quashed the finding and the sentence of the court martial aforesaid.

Before me, the verdict of the court martial was attacked chiefly on the ground that 'the manner in which the court convicted and sentenced the applicant was not judicial, wrong in law and in breach of the rules of natural justice.' In my view, having regard to the provisions of r 42(2), a conviction upon a charge which was not expressly formulated is not illegal where the acts which it was necessary to prove on a charge as framed and in respect of which evidence was led by the prosecution are the same as the facts upon which the accused could be convicted of the charge which was not expressly formulated, provided that the accused is put to no disadvantage and would have had to adduce no further evidence. I am supported in this by the following passage in the judgment of Taylor J in the case of *Lew Cheok Hin* v *R*[1] when dealing with s 167 of the Criminal Procedure Code ('the Code') which is generally in pari materia with r 47(2):

At first sight it seems startling that a prisoner should be summarily convicted, without express notice, of an offence quite different from the one charged. The section does not mean that. Its apparently general terms must be understood as an exception of a very limited scope, to the general rule ... There are two main tests. First, the facts must be such that the unframed charge was available from the start and could have been framed and tried concurrently under [s 166]; secondly, the evidence must have been presented in such a way as to raise all the same issues of fact as would have been raised had the unframed charge been framed and trial claimed on it. Not only must the evidence for the prosecution be the same but the court must be satisfied that the evidence for the defence would also have been the same.

It is obvious from the summing-up that the judge-advocate made only a general and very brief reference to the powers of the court martial to convict of an offence other than that charged under r 47(2) without affording any guidance as to the conditions necessary for the exercise of such powers or even mentioning what other offence the applicant could have been convicted of.

This, in my view, was clearly a misdirection by way of non-direction. But, it is necessary to go further, and see if, in convicting the applicant of the amended charge, in the circumstances hereinbefore mentioned, the court martial had acted in such a manner as to justify this court intervening by way of certiorari. First of all, I have reminded myself that the High Court is not a court of appeal in relation to the court martial whose decision is under review. (See *Associated Provincial Picture Houses* v *Wednesbury Corporation*[2] per Lord Greene MR at p 228.)

Secondly, if there is an established appeal procedure from the decision of the body under review the court usually prefers this course to be followed. (See *Square Meals Frozen Foods Limited* v *Dunstable Corporation*[3] and *R* v *Crown Court at Ipswich, ex p Baldwin.*[4]) However, there are exceptions: If the matter under consideration is primarily one of law, or if a speedy decision is needed, judicial review may be more appropriate. (See *R* v *Hackney Borough Council, ex p Teepee Estates (1956) Ltd*;[5] *R* v *Camden London BC, ex p Comyn Ching & Co (London) Ltd*[6] at pp 1420-1426; *R* v *Hillingdon London BC, ex p Royco Homes Ltd*;[7] *R* v *Board of Visitors of Hull Prison, ex p St Germain*[8] at pp 724-725. The existence of alternative remedies is not, therefore, by itself, a ground for refusing relief by way of prerogative orders. Furthermore, such

alternative remedies may not be designed to achieve the same ends as relief by way of prerogative orders. The right of appeal, for example, frequently relates to merits rather than legality. There are numerous instances in England where O 53 remedies have been found to be appropriate even if there is an independent remedy. (See *R* v *Huntingdon DC, ex p Cowan* (licensing appeal);[9] *R* v *Hillingdon LBC, ex p Royco Homes Ltd*;[9] *R* v *Paddington Valuation officer, ex p Peachey Property Corp.*[10]

Thirdly, courts can only interfere with military courts and matters of military law in so far as the civil rights of a soldier may be affected (per Suffian LP in *Peter Chong Ngen Onn & Ors* v *Col Adam bin Abdul Bakar & Ors*;[11] applying *R* v *Secretary of State for War, ex p Martyn.*[12] Fourthly, the principle upon which a civil court should act when considering decisions of military tribunals were enunciated by Hazen CJ in *Ex parte John Fogan*[13] at p 196 as follows:

> The members of court martial are undoubtedly amenable to the superior civil courts for injury caused to any person by acts done without jurisdiction, although there is not in the ordinary sense of the word an appeal from the ordinary court martial or from the order of an officer, if an injury affects only the military position of the person affected. The dismissal of an officer from the service, the deprivation of rank or the deprivation of military pay will not be remedied by a court of law. If a court martial convicts the accused of an offence which is not an offence under the Army Act (see RSC 1906 c 41, ss 74, 75, or of an offence with which he was not charged, it acts without jurisdiction, and where the offence is not properly charged the accused may be held not to have been charged with an offence at all. It has been held, however, that the proceedings of military courts will not be scrutinized with the same strictness as those of inferior civil courts. The result of acting without jurisdiction is that the act is void, and the conviction and proceedings may very properly be set aside by a superior civil court. It was held in *Re Mansergh* (1861) 1 B & S 400, 121 ER 764, that a writ of certiorari will issue only when the rights affected by the judgment of the court are civil rights and the court is acting without jurisdiction, and will not issue when the rights affected are dependent upon military status and military regulations. In giving judgment in that case, Cockburn CJ said that he agreed that when the civil rights of a person in military service are affected by the judgment of a military tribunal, in pronouncing which the military tribunal had either acted without jurisdiction or had exceeded its jurisdiction, the court ought to interfere to protect those civil rights, eg where the rights of life, liberty or property are involved.

Now, the basic principle is that for every distinct offence of which any person is accused there shall be a separate charge. (See r 40(1)(a) which is generally in pari materia with s 163 of the Code.) The object of this provision which, to my mind, has a common law content, being based on ideas of natural justice, has been explained by Jackson J in the case of *Humayoon Shah* v *R*[14] as follows:

> The charge I take it to be, first, a notice to the prisoner of the matter whereof he is accused, and it must convey to him with sufficient clearness and certainty that which the prosecution intends to prove against him and of which he will have to clear himself; second, it is an information to the court which is to try the accused, of the matters to which evidence is to be directed.

The issue central to the present case is whether the applicant was prejudiced by reason of the court martial convicting him in the circumstances outlined above. This issue is primarily a legal one and so is suitable for consideration by way of judicial review. In my opinion, the ingredients of the offence with which the applicant had been formally charged were materially different from those of the offence of which he was ultimately convicted. The gist of the offences formally charged was fraud and/or dishonesty, whereas that of the offence of which he was convicted was negligence. So, the issues which arose for decision being different, the evidence led by the prosecution which would have to be directed in relation to those issues would most probably have been different and, almost certainly, the cross-examination of the prosecution witnesses would be along different lines being aimed at showing that in acting in the manner he did at the material time the applicant was not guilty of any act, conduct or neglect to the prejudice of good order and service discipline.

In particular, the offence of which the applicant was ultimately convicted was that he did allow others to interfere with the account concerned of which he was the account holder resulting in the loss of $6,242.70. What is meant by the expression 'interfere'? Does it mean wilfully permitting others to misappropriate the money concerned? Or, does it mean, simply negligently relying on others to operate the account concerned? Who were the others? Were they competent? Then again, if it was wrongful for the applicant to have relied on them, was the negligence implied thereby so serious as to amount to conduct contemplated by s 87 of the Act? Surely, these were questions upon which the prosecution would have had to lead evidence and, equally certainly, the judge-advocate would have had, in his summing-up, to have directed the attention of members of the court martial to the same.

The matter does not end there, because I have no doubt that had the offence of which the applicant was ultimately convicted been an offence with which he was formally charged, then the evidence called by the defence and the submissions by his counsel would have been along very different lines compared to what had transpired during the trial. Indeed, when I queried the learned Senior Federal Counsel on this point he conceded that it would be difficult to say if the evidence for the defence would have been the same. Looking back, it must be borne in mind that the applicant is a man of military training and it would have been most material to know what experience he had of handling or accounting for large sums of money and why he was assigned such duties when a competent accountant or financial clerk

could have done the work. I would stress, that had negligence been formally charged at the outset, the applicant would most probably have explained why he relied on others for the discharge of his accounting duties. In such a situation, and bearing in mind that generally speaking, negligence for purposes of imposing criminal as opposed to civil liability must disclose conduct which goes beyond a mere matter of compensation between subjects; being conduct which merits punishment as constituting an offence against the state and for the various reasons given, the submissions and the summing-up in the court below would then have assumed a very different shape and form so that it would be impossible to confidently predict what the verdict would have been. Accordingly, I am satisfied that the applicant had been gravely prejudiced when he was convicted in the circumstances aforesaid.

I must now ask myself whether the present case comes within the striking range of certiorari. In the landmark case of *Ridge* v *Baldwin*[15] the appellant was the Chief Constable of the Brighton police force. In December 1957, he was committed for trial on an indictment charging him with conspiring with, inter alia, other police officers to obstruct the course of public justice. The trial came on before Donovan J – later Lord Donovan – after hearing which in those days could properly be categorized as a very long trial. It lasted 19 days. He was acquitted but three other of the four remaining defendants were convicted. In sentencing the three officers Donovan J made critical observations of Ridge's lack of professional and moral leadership. The following month Ridge stood his trial on a second indictment alleging the corrupt obtaining of a gift of £20, a reward for showing favour in relation to the affairs of the Crown, to which indictment he pleaded not guilty whereupon the prosecution offered no evidence. On the direction of the judge he was acquitted, but after he had left the dock the judge, addressing the Solicitor General said: 'It is not difficult now, however, to foresee the use to which the incidents I mentioned and others like them to be found in the case, will or may be put for the purpose of discrediting the officers of that force when they give evidence in future prosecutions, and the result in some cases may be unfortunate. This prospect and this risk will remain until a leader is given to the force who will be a new influence, and who will set a different example from that which was lately obtained. I realize that this is a matter which is about to engage the attention of those persons whose responsibility it is, and I have no desire to trespass upon that domain, but since the matter will also affect the administration of justice in the courts, I felt it right to make these observations'.

This was a clear enough hint to the Watch Committee, who the following day summarily dismissed Ridge. In a meeting, to which he had not been invited, the Committee decided that he had been negligent in the discharge of his duties but no specific charge had ever been formulated against him nor was he given any notice of any impending charges. He applied for a declaration that his dismissal was illegal, ultra vires and void, and payment of salary from 7 March 1958 or alternatively, payment of pension from that date in damages. Ridge was not the mere servant of the Watch Committee and they could dismiss him only on grounds stated in s 191(4) of the Municipal Corporations Act 1882. They purported to dismiss him on the ground of neglect of duty. The House of Lords held that the Watch Committee were bound to observe the principles of natural justice by informing him of the charges made against him and giving him an opportunity of being heard. This they had not done and accordingly, his dismissal was declared null and void.

And, as was well put by Lord Templeton, in *Bugdaycay* v *Secretary of State for the Home Department*,[16] an immigration case, 'where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process'. Clearly, therefore, at the heart of procedural fairness, excluding bias, lies the following: (1) the right to acknowledge of the opposing case; and (2) a fair opportunity to answer the charges. As Lord Denning said, when speaking for the Judicial Committee of the Privy Council, in *B Surinder Singh Kanda* v *The Government of Malaya*[17] at p 172:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and he must be given a fair opportunity to correct or contradict them.

I am satisfied that upon the face of the record, that the court martial in convicting the applicant of an offence in contravention of s 87 of the Act in purported exercise of their powers under r 47(2) had violated the rules of natural justice for the reasons I have adumbrated. The non-observance of natural justice is a separate basis for review. It may be violated even though a decision is reasonable in the *Wednesbury*[2] sense. (See p 22 para 2-12, RJF Gordon, *Judicial Review: Law and Practice* (1985)).

I am further satisfied that in convicting the applicant as aforesaid, in purported exercise of their powers under r 47(2), the court martial had acted beyond the scope of their powers and so acted without jurisdiction, in that the exercise of that power was subject to the two conditions mentioned by Taylor J in *Lew Cheok Hin's* case[1] neither of which had been complied with. The result was that the verdict was vitiated by illegality. (See Lord Diplock in *Council of Civil Services Unions* v *Minister for the Civil Service*.)[18]

In the result, certiorari must go to quash the verdict and sentence of the court martial and I therefore make a further order that the costs of these proceedings be paid by the respondents to the applicants. It follows, therefore, that the decision of the confirming officer confirming the finding and sentence of the court martial is set aside. I am now prepared to hear arguments as regards any consequential orders I should make.

Application allowed.

Solicitors: *Karpal Singh & Co.*

Reported by *Yap Shao Sin*

Sungei Way Leasing Sdn Bhd v Sena Land Development Sdn Bhd

HIGH COURT (PENANG) – CIVIL SUIT NO 22-3-88
EDGAR JOSEPH JR J
12 MAY 1989

Civil Procedure – Summary judgment – Triable issues – Lack of bona fides – Conditional leave to defend – Conditions – Rules of the High Court 1980, O 14

By an agreement in writing, the plaintiff had agreed to sell and the defendant to purchase certain equipment. It was a condition of the agreement that the ownership of and title to the equipment shall remain vested in the plaintiff until the full payment of the purchase price. Possession of the equipment was delivered to the defendant. The plaintiff later commenced an action based upon a breach and repudiation of the contract by the defendant and made an application for summary judgment under O 14 of the Rules of the High Court 1980. There was a dispute between the parties as to the amount owing to the plaintiff by the defendant and as to ownership of the equipment. The plaintiff confined themselves to seeking summary judgment for repossession of the equipment and in the alternative an order that the defendant be given leave to defend conditional upon the defendant delivering the equipment to the plaintiff to hold as security pending the trial of the action subject to the undertaking that the plaintiff will not part with the same save in accordance with any order of court and so to preserve the status quo. A procedural point was taken for the defendant, namely, that the application for summary judgment was premature in that at the date of its issue no appearance had as yet been entered, contrary to O 14 r 1(1). It was also contended that time was no longer of the essence of the contract as the plaintiff had accepted late instalment payments to account of the purchase price and had not reimposed the requirement that time be made the essence of the contract. The defendant also claimed that the equipment had become a fixture and that therefore ownership thereof accrued with the land on which it stood. Another defence raised was that the agreement was an unregistered bill of sale and not being in the statutorily-prescribed form was void for lack of registration. It was alleged by counsel for the plaintiff, and not challenged by counsel for the defendant, that the plaintiff was incurring costs in keeping the equipment under surveillance. Counsel for the plaintiff said that the appropriate condition to impose in the circumstances of the case as a whole was that unless the defendant delivered to the plaintiff possession of the equipment not later than 4pm on 10 March 1989, to be held by the plaintiff pending the final determination of the action, the plaintiff be at liberty to enter final judgment against the defendant for possession of the equipment and delivery of the same by the defendant forthwith, with damages to be assessed and costs of the action to be taxed.

Held, allowing the application:

(1) The irregularity regarding the commencement of the O 14 proceedings although no appearance had been entered had been waived by the defendant by taking a step in the proceedings, to wit, by filing a defence and moreover, at an earlier hearing, counsel for the defendant had appeared and argued the application on its merits. In any event, the court had a discretion to condone the irregularity under O 2 r 2 which the court chose to exercise since a dismissal on such a ground would merely have served to delay the proceedings and add to the costs.

(2) The submission as regards time being of the essence of the contract was irrelevant at that stage of the proceedings as the money claimed was not being pursued in the application and the court was concerned with a claim for possession of the equipment.

(3) Even if it were true that the equipment was indeed a fixture (and there was no evidence of this), there was no triable issue raised thereby. There was not a scrap of evidence to support the contention that the agreement was an unregistered bill of sale having regard to the definition of a bill of sale in the Bills of Sale Ordinance 1950 although evidence at the hearing may prove otherwise.

(4) It was common ground that the defendant had not paid a cent towards the substantial balance owing since November 1985, whilst still enjoying the use of the equipment, which was a profit-yielding chattel. In the absence of a satisfactory explanation – and the court did not consider there was any – there were facts from which the court could infer that prima facie the defendant's worth was in doubt and that its defence was lacking in good faith.

(5) Whilst the defendant should be granted leave to defend, the court should, in the exercise of its discretion, impose conditions to the order granting leave. Any conditions imposed should be reasonable. Just as it was important to ensure that a defendant is not deprived of his right to defend if he has an argument worth listening to, so it is equally important not to deprive him of that same right by imposing conditions on the grant of leave with which he is quite unable to comply.

(6) In all the circumstances of the case, the court exercised its discretion by making an order in the terms proposed by counsel for the plaintiff.

Cases referred to

1 *Ionian Bank Ltd* v *Couvreur* [1969] 1 WLR 781 (refd)
2 *Paclantic Financing Co Inc* v *Moscow Narodny Bank Ltd* [1984] 1 WLR 930 (refd)
3 *Vann Lynn Development Ltd* v *Pelias Construction Co Ltd* [1969] 1 QB 607 (refd)
4 *Ward* v *Plumbley* (1890) 6 TLR 198 (refd)
5 *Rosengrems Ltd* v *Safe Deposit Centres Ltd* [1984] 1 WLR 1334 (refd)
6 *Pilings* v *Kent Investments Ltd* [1985] 4 Const LJ 393 (refd)
7 *Shell International Petroleum Company Limited* v *Transnor (Bermuda) Ltd* The Times, 24 April 1987